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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

SEP 02 1999
 FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)
)
 Western Wireless Corporation Petition for) CC Docket No. 96-45
 Preemption of an Order of the South Dakota)
 Public Utilities Commission)

**COMMENTS OF THE ASSOCIATION FOR LOCAL
TELECOMMUNICATIONS SERVICES**

The Association for Local Telecommunications Services ("ALTS"), pursuant to Public Notice DA 99-1356 (rel. July 19, 1999) and Public Notice DA-1535 (rel. Aug. 4, 1999), hereby submits its Comments in support of the petition filed by Western Wireless seeking preemption of the South Dakota Public Utilities Commission's order denying Western Wireless designation as an eligible telecommunications carrier ("ETC") under Section 214(e) of the Telecommunications Act of 1996.

I. BACKGROUND

Western Wireless is the parent company of GCC License Corporation (hereinafter collectively "Western Wireless"). On August 25, 1998, GCC filed an application requesting designation as an ETC for all of South Dakota. GCC is currently offering mobile cellular service in South Dakota but sought ETC designation for a fixed wireless offering that would be provided using the cellular infrastructure together with fixed wireless network equipment (antennas and transmitters) at customer locations. In December of 1998 the South Dakota Public Service Commission (hereinafter "the PUC")

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held two days of hearings on GCC's request and on April 26, 1999, the PSC unanimously voted to deny the application.

The PUC found that "since GCC is not actually offering or providing a universal service offering through a fixed wireless system, it must deny GCC's application for ETC status."¹ Although GCC had argued that there is no requirement that a requesting carrier actually offer and be providing universal services at the time of the application, the PUC found that "the plain language of the statute reads otherwise."² The PSC concluded that "an ETC must be actually offering or providing the services supported by the federal universal service support mechanisms throughout the service area before being designated as an ETC. . . . The Commission cannot grant a company ETC status based on intentions to serve."³

Western Wireless has asked the Commission to preempt the South Dakota PUC decision on either of two grounds: that it violates Section 253 of the Telecommunications Act of 1996 because it acts as a barrier to entry and because under traditional preemption jurisdiction it thwarts and impedes federal goals. For all the reasons so articulately enumerated in the petition, the Commission should grant the petition expeditiously.

¹ In the Matter of the Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, Order in TC98-146, Findings of Fact at para. 18 (S.D. PUC May 19, 1999) (hereinafter "SD Order").

² Section 214 (e) provides, in part, that:

(1) . . . A common carrier designated as an eligible telecommunications carrier . . . shall be eligible to receive universal service support . . . and shall, throughout the service area for which the designation is received –

(A) offer the services that are supported by Federal universal support mechanisms . . . and
(B) advertise the availability of such services and the charges therefor using media of general distribution.

(2) . . . A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier . . .

In addition the Commission stated that even if it could grant a company ETC status based on intentions to serve, "the Commission finds that GCC has failed to show that its proposed fixed wireless

There has been a great deal of discussion (and argument) in the past year about whether consumers in rural and high cost areas are receiving the benefits of competition. If the Commission were to allow the South Dakota PUC decision to stand, significant competition in rural and high cost areas would be severely delayed and limited. Because the South Dakota PUC decision stands as an obstacle to the provision of competitive services in rural and high cost areas the Commission should preempt the state decision.

I. THE SOUTH DAKOTA PUC’S ORDER HAS THE “EFFECT OF PROHIBITING THE ABILITY OF WESTERN WIRELESS TO PROVIDE INTERSTATE AND INTRASTATE TELECOMMUNICATIONS SERVICE IN VIOLATION OF SCETION 253(a) OF THE TELECOMMUNICATIONS ACT.

As noted above, the South Dakota PUC found that it could not grant ETC status to Western Wireless because it was not, at the time of the application, providing the services required to be provided by an ETC under Section 214(e). Apparently, the South Dakota PUC believes that it cannot, under the statute, designate a carrier as an ETC unless it has already constructed its network and is providing service throughout the area for which ETC status is sought at the time of the submission of the application. But the South Dakota PUC’s reading of Section 214(e) is not the only possible reading of that Section. And, its interpretation is wholly inconsistent with the premise and purpose of universal service and almost certainly would result in no carrier other than an incumbent ever satisfying the criteria for ETC status.

While Section 214(e) of the statute may not be the best example of clear and precise legislative drafting, it is clear that interpretations other than that of the South

system could be offered to customers throughout South Dakota immediately upon being granted ETC status”

³ SD Order Conclusions of Law at para 6.

Dakota PUC are possible. Section 214 clearly contemplates that there will be two types of carriers – those that are applying to be ETCs - referred to in the statute as "carriers" and "ETCs". It is the "ETCs" that are required to offer the supported services throughout the area. Thus, the South Dakota PUC's reading of the statute is not the only, or even a reasonable reading. *Cf.* Universal Service First Report and Order, 12 FCC Rcd at 8853 (a carrier must receive ETC designation and "then must provide the designated services . . . in order to receive support.")

ALTS will not belabor the points made so well in the petition, except to note that the historical and statutory rationale for any universal service subsidies is that there are certain, high cost areas in the country for which, without a subsidy, no carrier could economically provide service to consumers at a price comparable to that charged consumers in lower cost, usually, urban areas. Most certainly, if the assumption upon which universal service was founded is that ILECs with their existing facilities and revenues cannot provide service at a "reasonable" price without a subsidy, then it is beyond doubt that a new carrier who does not yet have significant revenues cannot be expected to invest the enormous sums necessary to provide service in a high cost area if it is not eligible for universal service subsidies.

Section 253 of the Telecommunications Act requires the Commission to preempt any state action that has the effect of "prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." The South Dakota PUC Order clearly has the effect of prohibiting Western Wireless, and presumably any other new entrant, from entering many of the more rural and high cost markets in South Dakota. It may not affect provision of service in the low cost (urban) areas of South Dakota, but it

most certainly will affect the carriers' ability to provide service in many of the smaller exchanges. As Western Wireless noted, "the SDPUC's denial of the ETC status itself makes it impossible for Western Wireless to provide the service that would enable it to qualify, in the SDPUC's eyes, as an ETC."⁴

The South Dakota PUC may argue that even if its ruling does affect or prohibit the ability of competitive carriers to provide service in high cost areas it is somehow saved under paragraph (b) of Section 253 because it is a requirement "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. But such a position is unsupportable. The South Dakota action certainly serves to preserve and advance the universal service interests of the ILECs in the various high cost communities, but it is not the ILECs' interest in universal service subsidies that the statute seeks to protect. It is the interest of consumers that the universal service provisions seek to protect.

The universal service ideals will be better protected through competition and efficient, nondiscriminatory application of universal service subsidies rather than through continued monopoly provisioning of services. Universal service subsidies and the cost to

⁴ Petition at 11. This reminds one of the situation that Yossarian found himself in in Joseph Heller's famous novel:

There was only one catch and that was Catch 22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't but if he was sane he had to fly. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle. "That's some catch, that Catch-22," he observed.

"It's the best there is," Doc Daneeka agreed.
J. Heller, *Catch 22*, p. 40 (Dell Publishing).

consumers do not increase with designation of additional ETCs. In fact, competition should result in the reduction of the need for universal service support mechanisms.⁵

Additionally, the South Dakota PUC may argue that its action is necessary to protect universal service subsidies from “fly by night operators” who may seek ETC status solely for the purpose of receiving a federal windfall. However, it is highly unlikely that any carrier or business would affirmatively make the legal and financial investment in obtaining ETC status simply to seek universal service support. In any event, there is clear protection from this type of action in the Act. The statute provides that a carrier designated as an ETC shall be eligible for universal service support and shall offer the services that are supported by federal universal service support mechanisms and advertise the availability of such services. The only reasonable reading of that section is that if an ETC does not offer the services and advertise the availability of such services, universal service support would no longer be available to it. Thus, there should be no fear of the irresponsible or “fly by night” carrier receiving universal service support.⁶

II. UNDER GENERAL PRINCIPLES OF PREEMPTION LAW THE SOUTH DAKOTA DECISION MUST BE PREEMPTED.

The South Dakota PUC decision deprives Western Wireless of the opportunity to apply for federal universal service support. Under general principles of preemption law

⁵ The best way to satisfy the Commission’s universal service goals is to encourage competition in all local markets. Rather than threaten universal service as some ILECs have argued, competition in all markets, and specifically the designation of more than one ETC per market, will lower the cost of services, give consumers more choices, and encourage the provision of better and different services.

⁶ Finally, in any case in which there is a question as to the meaning of a section of a statute it must be read in such a manner that the section is internally consistent with the remainder of the Act. As indicated above, the South Dakota PUC’s reading of the statute would be totally at odds with the purpose and intent of the 1996 Act.

the Commission may preempt any state action that “thwarts” or “impedes” federal law or policy.⁷ The South Dakota decision is inconsistent with the federal statutory provisions relating to universal service, and would prevent the achievement of the universal service provisions of the Telecommunications Act and the various Commission orders seeking to implement those provisions.

The entire section of the Telecommunications Act of 1996 devoted to common carriage and telephony is based upon the premise that competition is the appropriate paradigm for the provision of all telecommunications services.⁸ More specifically, Section 214(e) presumes that the public interest is better served by multiple carriers receiving ETC designation. Thus, Section 214 requires state commissions to designate additional ETCs in most areas and allows the states to designate additional ETCs in rural area. Any state commission decision that necessarily prevents the designation of competitive carriers as ETCs thwarts and impedes that federal determination. In addition, the universal service provisions adopted by Congress and the rules implementing those provisions are based upon “competitive neutrality”. The South Dakota PUC’s decision is not competitively neutral because it denies new entrants the ability to provide service in any high cost area.

CONCLUSION

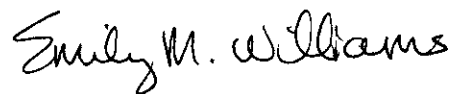
For the foregoing reasons the Commission must preempt the South Dakota PUC decision denying Western Wireless designation as an ETC and make clear that states

⁷ Louisiana Public Service Commission v. FCC, 476 U.S. 355, 376 (1986).

⁸ While there are some provisions that protect small and rural ILECs against unduly burdensome requirements (see 47 U.S.C. Sec. 251(f)), there is no exception to the general rule that competition in all markets is federal policy.

must designate competitive carriers as ETCs upon a reasonable demonstration⁹ that the carrier has the capability to provide facilities-based universal service to customers in a service area after the designation as an ETC, and the carrier has made a commitment to extend service to additional customers throughout the service area upon request and to advertise the availability of such services and the charges therefor using media of general distribution.¹⁰

Respectfully submitted,

A handwritten signature in cursive script that reads "Emily M. Williams".

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September 2, 1999

⁹ Obviously, the demonstration cannot be so stringent that no CLEC could meet it.

¹⁰ As Western Wireless noted, the South Dakota consideration of the pricing of its universal service offerings is also precluded by the statute and the Commission's universal service decisions.

Certificate of Service

I do hereby certify that on this 2nd day of September, 1999, copies of the attached Comments of the Association for Local Telecommunications Services in CC Docket No 96-45 were served by first class mail, postage prepaid, or by hand delivery as indicated, to the parties listed below.

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